

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PUGET SOUNDKEEPER ALLIANCE;)	
WASTE ACTION PROJECT;)	
WASHINGTON PUBLIC EMPLOYEES)	PCHB Nos. 02-162, 02-163, and
FOR ENVIRONMENTAL,)	02-164
RESPONSIBILITY; RESOURCES FOR)	
SUSTAINABLE COMMUNITIES;)	<i>Consolidated</i>
CITIZENS FOR A HEALTHY BAY; and)	
WASHINGTON ENVIRONMENTAL)	RESPONDENT DEPARTMENT OF
BALANCE, INC.,)	ECOLOGY'S RESPONSE IN
)	OPPOSITION TO APPELLANTS
and)	PUGET SOUNDKEEPER
)	ALLICANCE, ET AL.'S MOTION
THE BOEING COMPANY,)	FOR SUMMARY JUDGMENT
)	
and)	
)	
SNOHOMISH COUNTY,)	
)	
Appellants,)	
)	
v.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY, and)	
TOM FITZSIMMONS, its Director)	
)	
Respondent,)	
)	
and)	
)	
ASSOCIATION OF WASHINGTON)	
BUSINESS,)	
)	
Intervenor.)	
_____)	

I. INTRODUCTION

Appellants Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees for Environmental Responsibility, Resources for Sustainable Communities, Citizens for a Healthy Bay, and Washington Environmental Balance Appellants Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees For Environmental Responsibility, Resources For Sustainable Communities, Citizens For A Healthy Bay, and Washington Environmental Balance (“Environmental Appellants”) have brought a facial challenge to the National Pollutant Discharge Elimination System and State Waste Discharge Baseline General Permit for Stormwater Discharges Associated with Industrial Activities (“Industrial General Permit” or “IGP”). In electing to challenge the IGP on its face rather than as applied to any specific discharger, Environmental Appellants have taken on the considerable burden of proving that there are no set of circumstances under which the IGP can be lawfully applied. Environmental Appellants are unable to meet this burden as a matter of law and the Board should therefore deny Environmental Appellants’ Motion for Summary Judgment and grant summary judgment for Ecology. In the alternative, the Board must find that material issues of fact are present that preclude resolving this matter on summary judgment.

II. STANDARD OF REVIEW

Summary judgment may only be granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. WAC 371-08- 300(2), CR 56. The appropriate standard of review for Environmental Appellants’ facial challenge is whether there are any circumstances under which the IGP can be lawfully applied. As our Supreme Court explained in *Republican Party v. PDC*, 141 Wn.2d 245, 282, n.14 (2000):

An “as applied” challenge occurs when a plaintiff contends that a statute’s application in the context of the plaintiff’s actions or proposed actions is unconstitutional. If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. A statute is rendered completely inoperative if it is declared facially unconstitutional. However, a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied. *See In re Detention of Turay*, 139 Wn. 2d 379, 417 n.28, 986 P.2d 790(1999).

Tunstall v. Bergeson, 141 Wn.2d 201,220-221 (2000) (facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied); *State v. Aver*, 109 Wn.2d 303, 307 (1987) (a statute is not facially vague if it is susceptible to a

constitutional interpretation).

While *Republican Party, Bergeson, Aver and Turay* all involve facial constitutional challenges to a statute, the standard of review applied in each of these cases should also be applied to Environmental Appellants' facial attack on the IGP because Environmental Appellants do not contend that the IGP is invalid as applied to a particular discharger. Rather, Environmental Appellants contend that three provisions of the IGP are facially invalid and should be removed from the IGP. *See*, Motion for Summary Judgment at 25 (requesting that Board remand permit to Ecology for reissuance without three conditions).

If Appellants believe the IGP has been unlawfully applied in a particular context, the appropriate remedy is to seek to have the IGP declared unlawful as applied. However, the remedy Environmental Appellants seek in this appeal would prohibit Ecology from regulating any industrial stormwater discharges with an IGP that includes the three conditions Environmental Appellants object to (a compliance schedule for discharges into 303(d) listed waterbodies, mixing zones, and Ecology's authority to make authorizations in writing). In order to obtain this relief, Environmental Appellants must be able to demonstrate that there are no circumstances under which the IGP can be lawfully applied. Environmental Appellants are , unable to meet this burden and the Board should therefore deny summary judgment to Environmental Appellants and grant summary judgment to Ecology. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365 (1992) (summary judgment for nonmoving party appropriate where facts are not in dispute). In the alternative, the Board should find that the existence of material issues of fact preclude a summary judgment ruling for either party.

III. ARGUMENT

Ecology will address each of the arguments raised by Environmental Appellants in the order they are raised in the Motion for Summary Judgment. As demonstrated below, Environmental Appellants are unable to establish that there are no circumstances under which the IGP can be lawfully applied. Consequently, the Board should deny Environmental Appellants' Motion for Summary Judgment and should grant summary judgment to Ecology. In the alternative, the Board should find that material issues of fact exist which make summary judgment inappropriate.

A. Compliance Schedule For Discharges Into 303(d) Listed Waterbodies

Environmental Appellants allege that the compliance schedule in condition S3.D.2 is inconsistent with applicable law. Environmental Appellants advance four arguments to support their contention. Environmental Appellants allege that the compliance schedule does not expeditiously lead to compliance with water quality standards; that the compliance schedule lacks Ecology oversight; that the compliance schedule lacks the submission of certification of compliance from permittees; and that the compliance schedule is prohibited by the Clean Water Act.

As the party appealing a NPDES permit, Environmental Appellants bear the burden of proof. WAC 371-08-485(2). Consequently, in order to prevail on their summary judgment motion, Environmental Appellants must be able to demonstrate as a matter of law that the compliance schedule cannot be applied in a manner that will lead to expeditious compliance with water quality standards. Environmental Appellants are unable to meet this burden.

Step 1 of the compliance schedule requires permittees to identify source control and treatment options for the reduction of pollutants and implement non structural source control options within one year. Some permittees will bring themselves into compliance after completion of step 1. Permittees that are unable to demonstrate compliance with water quality standards after implementation of non structural source control options must implement structural source control options pursuant to step 3. Step 3, which must be completed within one year, will inevitably bring some permittees into compliance with water quality standards. Permittees that are unable to demonstrate compliance with water quality standards after implementation of structural source control options must implement treatment options pursuant to step 5. Step 5, which must be completed within one year, will inevitably bring some permittees into compliance with water quality standards.

Environmental Appellants have failed to meet their burden of establishing that the compliance schedule in Condition S3.D.2 cannot lead to expeditious compliance with water quality standards. While the Environmental Appellants and some Ecology employees may want a shorter compliance schedule, this desire falls far short of demonstrating as a matter of law that the compliance schedule cannot be applied in a manner that leads to expeditious compliance with water quality standards.

Environmental Appellants next argue that the compliance schedule lacks the necessary Ecology oversight. However, each step of the compliance schedule requires the permittee to submit a report to Ecology. Receipt of this report allows Ecology to review the action proposed by the permittee and either approve the action taken by the permittee or direct the permittee to take different action. The submission of reports to Ecology throughout the life of the compliance schedule satisfies the requirements of WAC 173-201A-160(3)(b). Environmental Appellants have failed to meet their burden of proof.

Environmental Appellants next argue that the compliance schedule fails to require that a permittee provide written notification of compliance with the interim requirements included in the compliance schedule. However, the report that permittees are required to submit at the conclusion of each step of the compliance schedule will provide Ecology with written notification of whether a permittee is in compliance with the interim steps of the compliance schedule. These reports meet the requirements of 40 C.F.R. § 122.47(a)(4) and WAC 173-226-180(4).

Finally, Environmental Appellants argue that the compliance schedule violates section 402(p)(4)(A) of the Clean Water Act because the compliance schedule does not require compliance with water quality standards within three years of permit issuance. However, Environmental Appellants have failed to establish that the compliance schedule is incapable of leading to compliance with water quality standards within three years. Rather, Environmental Appellants have merely established that it is possible to apply the compliance schedule in a manner that would allow more than three years to come into compliance with water quality standards. While this may be a possibility, it is equally possible that the compliance schedule will lead to compliance with water quality standards within three years.

The arguments advanced by Environmental Appellants are arguments that raise concerns regarding the manner in which Ecology and permittees implement the compliance schedule. However, merely establishing that it would be possible for Ecology to apply the compliance schedule in a manner that violates applicable law, does not satisfy Environmental Appellants' burden to demonstrate that the compliance schedule is not capable of being applied in a lawful manner. Environmental Appellants have failed to meet their burden of proof with respect to the compliance schedule and the Board must deny their request for summary judgment regarding the compliance schedule.

B. Mixing Zone

The Environmental Appellants allege that the mixing zone authorized in Condition S3.E of the IGP violates applicable law because it circumvents regulatory safeguards, depends on a false assumption regarding compliance with BMP and SWPPP requirements, and establishes a uniform mixing zone that is contrary to requirements to minimize mixing zone size and account for mixing zone overlap.

In order to obtain a mixing zone under the IGP, a permittee must certify under penalty of perjury that the permittee has implemented AKART, that the allowance of a mixing zone does not create a barrier to the migration or translocation of indigenous organisms to a degree that has the potential to cause damage to the ecosystem, and that allowance of a mixing zone does not have a reasonable potential to result in the loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the waterbody, result in damage to the ecosystem, or adversely affect public health as determined by Ecology. This required certification insures that the requirements of WAC 173-201A-100 are met before a mixing zone is authorized, and provides “the supporting information [that] clearly indicates the mixing zone would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health as determined by the department.” WAC 173-201A-100(4).

Environmental Appellants dismiss the mixing zone process authorized by the IGP as a “check the box and sign the paper” scheme. However, in signing the form for a mixing zone, a permittee is certifying information under penalty of perjury. The entire self reporting scheme under the NPDES program, as well as our judicial system, relies on the fact that people will provide reliable information when they are required to provide the information under penalty of perjury. It would be most ironic if the process our judicial system relies on to secure reliable testimony is, as a matter of law, determined to be an unreliable method for obtaining information regarding whether a permittee is entitled to a mixing zone. There is nothing in the water quality regulations that prohibits Ecology from relying on certifications from permittees to make mixing zone determinations, and, in the context of a general permit that regulates discharges from well over a thousand permittees, it is a reasonable exercise of discretion for Ecology to implement the mixing zone regulation as Ecology has done in the IGP.

Environment Appellants note that many permittees have historically failed to fully comply with BMP and SWPPP requirements and suggest that this fact somehow undermines the mixing zone procedures set out in the IGP. However, Environmental Appellants have cited no authority to support their apparent argument that a permit condition is invalid unless Ecology can guarantee that the condition will never be violated. There may be some permittees who will falsely certify that they have met all the conditions for a mixing zone, just like there may be some witnesses who will take the stand and offer false testimony. If a permittee falsely certifies that they are entitled to a mixing zone, that permittee is not only subject to prosecution for perjury, but will also have its mixing zone revoked. Consequently, it is a reasonable exercise of discretion for Ecology to make mixing zone determinations based on a permittee's certification, under penalty of perjury, that BMP and SWPPP requirements have been met.

It is likewise a reasonable exercise of discretion for Ecology to establish the mixing zone sizes that appear in the IGP. This permit represents Ecology's first attempt to establish definitive mixing zone sizes within the IGP. The mixing zone sizes established in the IGP are clearly authorized under WAC 173-20 1A-1 00(7). If Ecology determines that the mixing zones established in the IGP are having an adverse impact on the environment, Ecology can modify the IGP pursuant to WAC 173-226- 230(1)(d), which authorizes Ecology to modify or revoke a general permit if Ecology obtains information that indicates the cumulative environmental effect of discharges authorized under a general permit are unacceptable. In addition, pursuant to WAC 173-226-240(1)(d), Ecology can revoke general permit coverage if any mixing zone authorized under the IGP endangers human health, safety or the environment, or contributes to a violation of water quality or sediment standards.

The arguments raised by the Environmental Appellants with respect to the mixing zone authorized by the IGP are not arguments that address the legality of the actual mixing zone language in the IGP. Rather, the arguments raised by Environmental Appellants address concerns regarding whether permittees will properly certify compliance with mixing zone requirements and whether Ecology will properly implement the mixing zone requirements under the IGP. While Ecology appreciates these concerns, the potential that some permittees may improperly claim a mixing zone or that Ecology may not properly implement mixing zone requirements at some point in the future does not invalidate the mixing zone language in the IGP. Put simply, concerns regarding how a permit condition may be implemented in the future does

not meet Environmental Appellants' burden of proof with respect to the validity of a permit condition.

The mixing zone language in the IGP requires permittees to certify, under penalty of perjury, that they have met all applicable requirements to obtain a mixing zone. The mixing zone sizes in the IGP are within the sizes authorized by applicable regulation, and Ecology has sufficient legal authority to reduce the size of any mixing zone that creates unacceptable environmental impacts. Environmental Appellants have failed to meet their burden of proof with respect to the mixing zones authorized in the IGP, and the Board must deny their request for summary judgment regarding mixing zones.

C. Authorization "In Writing"

Environmental Appellants have identified seven instances in the IGP where Ecology has reserved the discretion to provide written authorization to allow a permittee to deviate from the terms of the IGP. Environmental Appellants erroneously assert that this reservation of flexibility by Ecology violates WAC 173-226-080(1)(a) because it allows a permittee to discharge in a manner that is not consistent with the terms and conditions of the permit. However, while Environmental Appellants may not like the "unless otherwise authorized in writing" language, the fact that this language is in the permit means that a permittee who acts in compliance with Ecology's written authorization will be discharging in a manner that is consistent with the terms and conditions of the permit. Consequently, the "unless otherwise authorized in writing" language clearly does not violate WAC 173-226-080(1)(a). Moreover, Ecology's reservation of discretion to provide written authorization to allow a permittee to deviate from the terms of the IGP is a reasonable exercise of discretion in the context of a general permit. While Ecology has the authority to modify the conditions of a general permit pursuant to WAC 173-226-230, it will rarely be necessary to modify the entire general permit merely to provide flexibility to a single permittee. Likewise, while WAC 173-226-240 authorizes Ecology to revoke coverage under the general permit, it will not always be necessary for Ecology to revoke permit coverage merely to provide some flexibility with respect to particular permit conditions for a particular permittee.

The "unless otherwise authorized in writing" language is a reasonable exercise of Ecology's discretion that provides the flexibility needed to allow Ecology to effectively implement the general permit. The "unless otherwise authorized" language does not violate any applicable law, and the Environmental Appellants have failed to meet their burden of

establishing that this language is an arbitrary or capricious exercise of Ecology's discretion. Consequently, the Board must deny Environmental Appellants' request for summary judgment with respect to the "unless otherwise authorized in writing" language.

IV. CONCLUSION

For the reasons discussed above, the Board should deny summary judgment to Environmental Appellants and grant summary judgment to Ecology. In the alternative, the Board should find that the existence of material issues of fact precludes a summary judgment order for either Ecology or Environmental Appellants.

RESPECTFULLY SUBMITTED, this 21st day of April, 2003.

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